Supreme Court, U.S.
FILED
00-825 NOV 20 2000
OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

OCTOBER TERM 2000

MINDGAMES, INC.

Petitioner,

v.

WESTERN PUBLISHING COMPANY, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

E. CAMPION KERSTEN
Attorney for Petitioner

Of Counsel:
KERSTEN & MCKINNON, S.C.
231 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Telephone: (414) 271-0054

34pp

QUESTIONS PRESENTED

1. Has the Seventh Circuit imposed an unnecessary and confusing burden on trial courts and litigants by forcing nonmoving parties in summary judgment proceedings to anticipate and make an evidentiary record on all potentially dispositive issues, no matter how limited the summary judgment motion made?

2. Did the Seventh Circuit depart from the usual course of judicial proceedings and violate rulings of this Court when it affirmed *sua sponte* partial summary judgment dismissing MindGames' claim for lost profits on grounds not raised by Western in or considered by the district court, unsupported by the record, without notice to MindGames and as to which no opportunity was afforded to present evidence?

3. Did the Seventh Circuit violate rulings of this court by preferring anti-Mindgames' inferences over available reasonable inferences favoring MindGames on controlling issues?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties.

MindGames, Inc., is an Arkansas corporation. It has no parent and no publicly held company owns ten percent or more of its stock.

Western Publishing Company, Inc., is now known as Golden Books Publishing Company, Inc. Its parent corporation is Golden Books Family Entertainment, Inc., a Delaware corporation. Petitioner is unaware of any other publicly held company that owns ten percent or more of Golden Books Publishing Company, Inc.'s stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

CITATIONS OF REPORTS 1

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 4

A. Statement of Facts 4

B. Course of Proceedings Below. 6

C. Basis for Federal Jurisdiction. 7

REASONS FOR GRANTING THE WRIT 8

I. Introduction: What the Court of Appeals Did and Why It Raises an Important Issue for this Court. 8

II. *The Court of Appeals Majority Departed from the Accepted and Usual Course of Judicial Proceedings and Its Opinion Conflicts with the Fifth and Seventh Amendments and Decisions of this Court in Granting Summary Judgment Sua Sponte without the Non-moving Party Having Fair Notice and an Opportunity to Present Evidence.* . . . 12

III. *The Majority Opinion Conflicts with Supreme Court Summary Judgment Precedent by Improperly Drawing Controlling Inferences Against MindGames.* 21

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 21, 22, 25

Blum v. Bacon,
457 U.S. 132 (1982) 16

Catrett v. Johns-Manville Sales Corp.,
756 F.2d 181 (D.C. Cir. 1985) 18

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 11, 16-18, 25, 26

Door Systems, Inc. v. Pro-Line Door Systems, Inc.,
83 F.3d 169 (7th Cir. 1996) 22

Eastman Kodak Co. v. Image Technical Services, Inc.,
504 U.S. 451 (1992) 23, 24

Finley v. North River Records, Inc.,
148 F.3d 913 (8th Cir. 1998) 16, 20

In re Murchison,
349 U.S.133 (1955) 19

Jim Halsey Co. v. Bonar,
683 S.W.2d 898 (Ark. 1985) 16, 20

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 18

Martin v. Wilks,
490 U.S. 755 (1989) 19

Marvell Light & Ice Co. v. General Electric Co.,
259 S.W. 741 (Ark. 1924) 8, 15

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 22, 23, 25

Schweiker v. Hogan,
457 U.S. 569 (1982) 16

Tulsa Professional Collection Services, Inc. v. Pope,
485 U.S. 478 (1988) 18

Union National Bank of Little Rock v. Moshbacher,
933 F.2d 1440 (8th Cir. 1991), *cert. denied*,
502 U.S. 1031 (1992) 20

Wallace v. SMC Pneumatics, Inc.,
103 F.3d 1394 (7th Cir. 1997) 21

Western Publishing Co., Inc. v. MindGames, Inc.,
944 F. Supp. 754 (E.D. Wis. 1996) 10

Statutes and Rules

U. S. CONST. amend. V 2, 12

U. S. CONST. amend. VII 3, 12, 16, 24

28 U.S.C § 1404 6

28 U.S.C. § 1254 2

28 U.S.C. § 1291 7

28 U.S.C. § 1332 7

Fed. R. Civ. P. 56 . . . . . 3, 12, 18, 21, 25, 26

Fed.R.App.P. 28 13

Sup. Ct. R. 10 1

Sup. Ct. R. 29.2 2

Other Authorities

JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 56.50 at 56-312 (3d ed. 1997) 22

CITATIONS OF REPORTS

Western Publishing Company, Inc. v. MindGames, Inc., and *MindGames, Inc. v. Western Publishing Company, Inc.*, 944 F. Supp. 754 (E.D. Wis. 1996)

Western Publishing Company, Inc. v. MindGames, Inc., and *MindGames, Inc. v. Western Publishing Company, Inc.*, 995 F. Supp. 949 (E.D. Wis. 1998)

MindGames, Inc. v. Western Publishing Company, Inc., 218 F.3d 652 (7th Cir. 2000)

PETITION FOR WRIT OF CERTIORARI

MindGames, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit dated June 22, 2000. By affirming a summary judgment dismissal on grounds not raised in or considered by the district court, concerning which there is no supporting record and of which the nonmoving party had no fair notice or opportunity to make its record in opposition, and by selecting among competing inferences those that favored the movant, the court departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power and decided important questions in a way that conflicts with relevant decisions of this Court, all within the meaning of Sup. Ct. R. 10(a) and (c).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this petition was filed on June 22, 2000. It is reprinted in the appendix hereto at App. 1-19. By order filed August 22, 2000, the Seventh Circuit denied a petition for rehearing. App. 40. The appeal to the Court of Appeals was from decisions in the United States District Court for the Eastern District of Wisconsin, dated October 11, 1996 and February 25, 1998 and the final judgment based thereon entered March 20, 1998. The decisions and judgment granting summary judgment are reprinted in the appendix hereto at App. 20 and App. 42.

JURISDICTION

The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on June 22, 2000. The petition of MindGames, Inc., for rehearing and rehearing *en banc* was denied on August 22, 2000. This petition is filed within ninety days of the petition for rehearing and rehearing *en banc*, as extended by Supreme Court Rule 29.2.

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION: AMENDMENT V

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

UNITED STATES CONSTITUTION: AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 56 (c) and (e), Federal Rules of Civil Procedure

(c) Motion and Proceedings Thereon. The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to

interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

A. Statement of Facts

This is a diversity action for damages by MindGames, Inc. ("MindGames"), as licensor, against Western Publishing Company, Inc. ("Western"), as licensee, for breach of a license agreement ("License") relating to a patented adult board game known as *Cleavor Endeavor*.

Larry Blackwell invented *Clever Endeavor* on which a patent was issued in 1991. He assigned the rights to MindGames, which he established to manufacture and market the game.

MindGames began selling *Clever Endeavor* in September 1989. Approximately 30,000 copies were sold through more than 400 retailers coast-to-coast in its first 75 days on the market. The game received high praise in the press and won many awards. Many retailers sold out of the game during the 1989 Christmas season, at a pace even faster than "blockbuster" games of the era.

In March 1990 MindGames licensed *Clever Endeavor* to Western, the second largest game company in America, and Games Gang, Ltd., a major marketer of games including *Trivial Pursuit* and *Pictionary*, both hugely successful. The License called for the payment of royalties to MindGames of about 15% of game sales.

Western and Games Gang representatives told Blackwell at the 1990 Toy Fair in New York (the principle game/toy trade show in the United States) that they regarded *Clever Endeavor* as the "next *Pictionary*" and "next *Trivial Pursuit*." *Clever Endeavor*'s excellent early track record enabled MindGames to negotiate a significantly more favorable royalty arrangement (15%) than the "standard" 3%-7%.

MindGames alleges Western and Games Gang breached the License in many respects over the three years of the License which proved fatal for *Clever Endeavor*. The breaches were not put in issue by the summary judgment motions.

MindGames claims damage for loss of future royalties based upon the failure of Western and Games Gang to fulfill their obligations under the License. These breaches destroyed the value of the game in the marketplace and prevented it from reaching even a fraction of the potential widely recognized for it when the License was entered into, even though the game generated royalties of approximately $600,000 on sales of over $4 million. MindGames claims that, properly handled, the game would likely have generated far greater royalties than it did.

B. Course of Proceedings Below.

On May 25, 1994 MindGames filed this breach of contract action in the U.S. District Court for the Eastern District of Arkansas seeking, among other relief, royalties and lost profits arising from the breach of the *Clever Endeavor* License.

On the same day, Western filed a declaratory judgment action in the U.S. District Court for the Eastern District of Wisconsin seeking a ruling that it did not owe MindGames any monies arising out of the License.

The Arkansas court granted Western's motion to transfer MindGames' action to Wisconsin pursuant to 28 U.S.C § 1404(a), where the two cases were consolidated.

The License called for the application of Arkansas law. On October 11, 1996 the district court granted Western's motion for partial summary judgment, holding that MindGames was a "new business" (App. 33), that new businesses may not make claim for lost profits as a matter of Arkansas law (App. 28) and dismissed MindGames' claim for lost profit damages.[1] App. 38.

---

[1] On February 25, 1998, the district court granted Western's second motion for partial summary judgment holding that, as a matter of Arkansas law, MindGames is not entitled to recover approximately $1.2 million in renewal fees arising out of the License or any extension of it. This ruling, which the Seventh Circuit affirmed, is not an issue here.

MindGames asserted certain other damage claims. The parties entered into a tolling agreement relating to these non-dismissed claims which were then dismissed without prejudice on March 20, 1998.

MindGames filed its notice of appeal on April 3, 1998. On June 22, 2000 the Seventh Circuit Court of Apeals unanimously rejected the "new business" rule relied on by the district court in dismissing MindGames' claim for lost profits (Opinion at App. 7-12; dissent at App. 15) but, *sua sponte* and by a divided court, affirmed the dismissal on the ground MindGames had offered no evidence of lost sales in the district court. App. 14.

MindGames filed a timely petition for rehearing and rehearing *en banc* which was denied on August 22, 2000, with Judge Fairchild voting to grant rehearing. App. 40-41.

C. Basis for Federal Jurisdiction.

The jurisdiction of the district court was based upon 28 U.S.C. § 1332, in that the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs, and is between citizens of different states. MindGames is a citizen of the State of Arkansas and Western is a citizen of the State of Wisconsin.

The jurisdiction of the court of appeals was based upon 28 U.S.C. § 1291. The summary judgment orders appealed from were entered on October 11, 1996 and February 25, 1998 and became final on March 20, 1998 when a judgment was entered dismissing all claims and causes of action of the plaintiff not previously dismissed on summary judgment. By stipulation all claims of Western Publishing Company, Inc., in a companion case were dismissed without prejudice on May 1, 1998, *nunc pro tunc* as of March 20, 1998. The filing date of the notice of appeal was April 3, 1998.

REASONS FOR GRANTING THE WRIT

I. Introduction: What the Court of Appeals Did and Why It Raises an Important Issue for this Court.

The ruling of the majority in this case puts summary judgment nonmovants in an almost impossible position and forces them to prove every element of their cases at the summary judgment stage lest the court of appeals dismiss for lack of evidence on a ground not raised by the movant, not ruled on by the district court and without the responding party having been notified of the need to produce evidence. Heretofore, a nonmoving party has been required only to respond to specific issues identified by the moving party or the court. If the ruling here stands, no party facing a motion for summary judgment in the Seventh Circuit can afford to present only proof and legal argument addressing the point of the motion and such other issues as the district court may identify. Rather, the respondent must now anticipate and deal with *every* issue that might some day be of concern to the appellate court.

The court of appeals unanimously held the "new business" rule, if still valid at all in Arkansas, would not apply to MindGames' claims for lost royalties, rejecting Western's invitation to follow *Marvell Light & Ice Co. v. General Electric Co.*, 259 S.W. 741 (Ark. 1924). App. 7-12; Dissent, App. 15.

Having rejected Western's *only* attack on MindGames' claim for lost royalties, the majority nevertheless affirmed dismissal of the claim on a ground not within either party's statement of issues there and not raised or considered in the

district court: namely, that MindGames failed to prove how many copies of *Clever Endeavor* Western would probably have sold (on which MindGames, as licensor, would earn royalties), absent breach.

> [W]e do not see how the number of copies that would have been sold but for the alleged breach could be determined given the evidence presented in the summary judgment proceedings (a potentially important qualification, of course); and so MindGames' proof of damages is indeed excessively speculative. Those proceedings were completed with no evidence having been presented from which a rational trier of fact could conclude *on this record* that some specific quantity, or for that matter some broad but bounded range of alternative estimates, of copies of "Clever Endeavor" would have been sold had Western honored the contract.

App. 13-14 (emphasis in original; citations omitted). However, Western had never raised in the district court the issue whether MindGames had evidence from which a jury could reasonably estimate the quantity of games that would have been sold had Western performed.

Consequently, MindGames was never called on to file evidence from which a jury could reasonably determine sales *Clever Endeavor* would likely have achieved had Western performed. It had no notice of the need to present evidence of the *amount* of its lost-royalty damages because Western claimed only that MindGames, as a "new business," was not

entitled to prove any lost profit damages under Arkansas law and the district court did not raise or consider the issue.

Western's sole attack on MindGames' claim for lost royalties was the "new business" rule. The district court saw that as the only issue before it: "Western claims that the 'New Business Rule,' which prevents new and unestablished business ventures from collecting lost profits as damages in breach of contract or tort cases, guides this case as a matter of law, and mandates partial summary judgment in Western's favor." *Western Publishing Co., Inc. v. MindGames, Inc.*, 944 F. Supp. 754, 755 (E.D. Wis. 1996), App. 22.

Western's summary judgment brief in the district court contained a single substantive argument: "The 'New Business Rule' Prevents MindGames From Recovering Any Lost Profits." App. 52. Its proposed findings of fact, required by local rule, did not address whether lost future sales were reasonably provable. Western's reply brief in the district court also dealt only with the "new business" rule, App. 71-88.

The district court brushed aside as "irrelevant" *all* matters not directly relating to the single, legal issue raised by Western -- whether the "new business" rule barred *per se any* attempt to establish lost profits. 944 F. Supp. at 755, n.1, App. 22.

The record made by MindGames did include evidence of specific contract breaches by Western from which damages could readily be inferred and described the variety of damage claims arising from the breaches. Blackwell Summ.Judg.Aff. ¶¶ 26-27 (App. 90-93) and 31-35 (App. 93-96). But a record

on the volume of lost sales was never developed because the issue of whether there was evidence available to MindGames sufficient to prove lost sales was not raised.

The court of appeals majority disregarded the limited scope of the issue Western presented in the district court and that the single ground asserted by Western and considered by the district court – that Arkansas's "new business" rule precluded proof of lost profits as a matter of law – did not require MindGames to develop a record on the issues of breach and the volume of lost sales.

Instead, the majority summarily dismissed the claim for supposed lack of evidence even though MindGames had never been notified it was called upon to present the evidence and was given no opportunity to present it. As argued infra, such summary judgment by ambush is prohibited by this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The court of appeals majority also grounded its ruling on anti-MindGames' inferences that had no basis in the record and in the face of available reasonable inferences that favored MindGames.

II. The Court of Appeals Majority Departed from the Accepted and Usual Course of Judicial Proceedings and Its Opinion Conflicts with the Fifth and Seventh Amendments and Decisions of this Court in Granting Summary Judgment Sua Sponte without the Non-moving Party Having Fair Notice and an Opportunity to Present Evidence.

The court of appeals penalized MindGames, the nonmovant, for failing to introduce evidence on a damage issue *not* clearly raised by the movant and thereby rewarded the movant for failing to raise an unambiguous defense. Fed. R. Civ. P. 56 was never intended to be such a trap for the unwary.

MindGames and the district court believed Western based its summary judgment motion solely on the "new business" rule. Western did not challenge MindGames to come forward with evidence of lost future sales. No evidence was ever offered by Western to support the proposition that lost profits are unprovable with respect to an entertainment product. The record in this regard contains nothing more than the conclusory statements of Western's counsel, offered as a reason to uphold and apply the "new business" rule.

Nor did the district court request that MindGames make a showing of lost sales and royalties. Had it done so, MindGames could have filed evidence such as market studies, statistical analyses, comparisons of sales results in geographical areas where appropriate promotions and advertising outlets were not used versus those where they were used, projections of sales patterns established prior to the breach, sales forecasts generated by Western, sales

performance by comparable products and comparisons of market results in areas where proper advertising expenditures were made with those where they should have been but were not made. Damages well removed from the realm of speculation can be established by showing canceled orders, orders lost due to late ad campaigns, comparing actual sales results at times and in areas where appropriate advertising was utilized as compared with times and areas where it was not, sales experience with games that were properly packaged and complete versus experience with games that were defectively packaged and had missing pieces. Before-and-after comparisons can be made with respect to the breaches that involve preferring other products, lowering commissions, absence of public relations activity, unauthorized price increases and lapses in advertising.

As required by Fed.R.App.P. 28(b)(2), MindGames set forth the relevant issues presented for review in its main court of appeals brief as follows:

> Did the district court err in holding that, under Arkansas law, the New Business Rule barred MindGames' claim for lost profits where the profits consisted of royalties generated by its experienced licensees and were determined by sales, not profits?

Western's counter-statement contained only one issue relevant to the proof of lost profits:

> Did the District Court err in holding that under Arkansas law, the New Business Rule precluded a licensor from recovering future

> profits it allegedly lost as a result of the licensee's alleged breaches of a license agreement to manufacture and distribute a new adult board game?

Thus, the basis for the majority's affirmance was not given by either party as an issue presented to that court. The issue could not have been presented to the court of appeals because it had not been raised in the district court.

The majority referred to the absence of evidence "from which a rational trier of fact could conclude *on this record* that some specific quantity, or for that matter, some broad but bounded range of alternative estimates, of copies of 'Clever Endeavor'" would have been sold. App. 14 (emphasis in original). The majority then referred to an argument Western presented to the court of appeals – not the district court – and concluded the "argument was brief but not so brief as to fail to put MindGames on notice of a possible alternative ground for upholding the district court's judgment." App. 15. The majority then faulted MindGames because, in its reply brief, it "pointed to no evidence from which lost royalties could be calculated to even a rough approximation." *Id.*

MindGames, however, had never been called upon to develop and file such evidence below *because the issue of uncertain lost sales had not been raised as a ground for dismissal apart from the "new business" rule*. The dissent recognized this.

> It is true that in responding to Western's motion for partial summary judgment MindGames did not provide evidentiary

> material tending to show the breaches by Western nor that such breaches caused a loss of sales. This should not be deemed a waiver or forfeiture of an opportunity to do so *because of Western's complete reliance in its motion on the new business rule and Marvell, which, if applied, would prevent proof of breach and causation of loss*.

Dissent, App. 17 (emphasis supplied).

Western's appeal brief made an oblique, factually unsupported reference to supposed difficulty of proving lost profits on entertainment products *as a reason for not retreating from the "new business" rule*. MindGames *did* respond in its reply brief to the point of Western's references (an aspect of its "new business" rule argument), and the bulk of MindGames' reply brief was, of course, addressed to the "new business" rule argument generally.

It is manifestly unfair to hold, as the majority did, that the *en passant* references to speculation in Western's appeal brief (a) in fact constituted an argument on an issue Western had not even included in its statement of the issues presented, (b) should have been read by MindGames as raising a separate issue Western was precluded from raising because not presented below, and (c) required MindGames to cite proof it had never been called upon to file below.[2]

---

[2] "New business" rule aside, the majority disregarded Arkansas's liberal damage rule permitting lost profit damages in entertainment cases

(continued...)

MindGames' Seventh Amendment right to a jury trial must not be rendered so fragile as to be taken away on such attenuated grounds.

This Court has countenanced reliance on arguments not raised in the district court as a basis for affirmance, but only when decided on the basis of the record developed after fair notice in that court. *Blum v. Bacon*, 457 U.S. 132, 137, n.5 (1982); *Schweiker v. Hogan*, 457 U.S. 569, 585, n.24 (1982). It has never countenanced reliance on arguments of which the non-movant did not have fair notice, compare *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and that are not supported by any record in the district court.

The court of appeals decision here violates a protection specifically preserved in *Celotex* against summary judgment by ambush. While the *Celotex* court ruled an evidentiary record is not always required of the movant in order to call upon the nonmovant to present a record demonstrating a material issue of fact, the court held notice must at least be given of all issues on which the *nonmovant* is being required to make an evidentiary record. The court stated:

---

[2](...continued)
even where the claimant is inexperienced. *Finley v. North River Records, Inc.*, 148 F.3d 913, 918-19 (8th Cir. 1998) (allowing a fledgling music concert promoter to recover lost future profits under Arkansas law despite the absence of prior successes). The uncertainty preventing recovery of lost profits relates to the *fact* of damages, not the *amount*. *Jim Halsey Co. v. Bonar*, 683 S.W.2d 898, 903 (Ark. 1985) (concert promoter could claim lost profits on future concerts despite no evidence of successful earlier promotions). For purposes of the summary judgment motion the "fact" of damage was not questioned and must be presumed.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323. The court then emphasized:

> As we have explained, the burden on the moving party may be discharged by "showing" – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case.

477 U.S. at 325.

Citing Judge Bork's dissent in the court below, the *Celotex* court acknowledged the power of the district court to grant summary judgment *sua sponte*, but only "*so long as the losing party was on notice that [it] had to come forward with all of [its] evidence*." 477 U.S. at 326 (emphasis supplied). The dissenting opinion this court approved in *Celotex* goes on to state:

> This rule clearly means that summary judgment does not require affirmative evidentiary proof of the absence of a factual dispute. *Rather the trial judge need only notice this absence and demand that it be corrected.* If it is not

> corrected *after notice*, it becomes the trial judge's duty to grant summary judgment to conserve scarce judicial resources and avoid a useless trial.

Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 189 (D.C. Cir. 1985) (emphasis supplied).

Even where the movant's grounds for a summary judgment motion are limited, the ruling of the court of appeals here effectively requires the nonmovant to anticipate and make a record addressing all potential issues in the case. Where cases could otherwise be determined at an early stage on the basis of a single issue of law, summary judgment motions could not be fairly heard until *all* discovery is complete. This could not have been the intended effect of Fed. R. Civ. P. 56, which was designed to facilitate the efficient and timely disposition of cases under appropriate circumstances.

Where granted on grounds of which the nonmovant has received no effective notice, the summary judgment has been granted without a fair hearing. If the law is to be that, in responding to even a limited motion for summary judgment, the nonmovant must address all possible grounds, litigants must first be told that is the rule. *Celotex* assured them they were safe in responding only to the issues raised. That assurance is violated by the court of appeals decision here.

Fair notice and an opportunity to be heard are essential to due process. A civil cause of action is a property interest entitled to constitutional due process protection. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422,

428 (1982), a "fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S.133, 136 (1955), and this court acknowledges "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

MindGames was deprived of due process because it did not have fair notice that it was required to prove its lost profit damages case in the district court at the summary judgment stage.

Western may argue it raised in the district court the alternative ground that MindGames' claim was too speculative irrespective of the "new business" rule.

It did not. What it did argue was that the "new business" rule should be strictly applied because this case involves an entertainment product. App. 63.

Western may point to its district court argument that "even if the [district court] were to reject a strict application of the New Business Rule, [it] should still grant Western's motion for summary judgment because MindGames has no history of past profits." App. 64. Western was here only arguing for a broad application of the "new business" rule because MindGames had no "history of past profits." Neither this assertion nor anything else in Western's summary judgment motion put MindGames on notice of a need to produce evidence or make its record on the effects of Western's contract breaches on future sales of *Clever*

Endeavor.[3] MindGames was entitled to assume defeating application of the "new business" rule defeated summary judgment.

None of MindGames' responsive arguments in the district court departed from the context of Western's summary judgment motion, namely the "new business" rule. Indeed, we pointed out to the district court (App. 99):

> It is important to keep the point of Western's summary judgment in sharp focus. It is that the New Business Rule prevents MindGames from proving "lost profits" as a matter of law.

And further (App. 99): "On this motion we are not arguing the sufficiency of proof, but whether MindGames has the right to present proof."

---

[3] Western's argument confuses "profits" with "sales" and is contrary to Arkansas law. See *Union National Bank of Little Rock v. Moshbacher*, 933 F.2d 1440 (8th Cir. 1991), *cert. den.*, 502 U.S. 1031 (1992) (Ark. law; established business can recover lost future profits despite recent loss history); *Jim Halsey Co., Inc. v. Bonar*, 683 S.W.2d 898 (Ark. 1985) (concert promoter can claim lost profits despite evidence of successful prior promotions); *Finley v. River North Records*, 148 F.3d 913 (8th Cir. 1998) (Ark. law; fledgling music concert promoter can recover lost future profits despite absence of any prior success).

III. The Majority Opinion Conflicts with Supreme Court Summary Judgment Precedent by Improperly Drawing Controlling Inferences Against MindGames.

The panel unanimously rejected the district court's ground for granting summary judgment. In affirming summary judgment nonetheless, the majority drew inferences against MindGames, the nonmoving party, and thus violated guidelines set by this Court.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), mandates that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial" and that "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

Overuse of Fed. R. Civ. P. 56 was previously recognized by the Seventh Circuit as infringing upon Seventh Amendment rights and causing meritorious cases to be dismissed without benefit of the record being developed at trial. It said in *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397 (7th Cir. 1997):

> The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. The drift is understandable, given caseload pressures that . . . sometimes make it difficult to find time for civil trials in the busier federal districts. But it must be resisted. . . ."

(Citations omitted.) *See also Door Systems, Inc. v. Pro-Line Door Systems, Inc.*, 83 F.3d 169, 172 (7th Cir. 1996), and JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 56.50 at 56-313, -314 (3d ed. 1997).

The majority's decision here, however, disregards such concerns. It concludes without a trial, on a record limited to the "new business" rule issue, that MindGames would not be able to prove the volume of lost sales. In so doing, it not only disregarded the limitations on the record made below but also indulged in at least two critical anti-MindGames inferences.

First, after acknowledging a pro-MindGames inference that more games could have been sold if properly marketed by Western, the majority found "an equally if not more plausible possibility is that the reason Western didn't market the game more vigorously was that it correctly sensed that demand had dried up." App. 13.

It is unprecedented that the majority should divine Western's intent in not properly marketing *Clever Endeavor* and that demand for the game "dried up." Western presented no affidavit, no document, no deposition, no evidence of any kind to explain *why* Western mishandled the marketing of *Clever Endeavor*. Western itself did not presume to argue Western's "reasons." The first time this inference appeared in the case is in the majority's opinion, beyond any possible opportunity for MindGames to respond. *Anderson*, 477 U.S. at 255, forbids preferring, much less creating, such an anti-MindGames inference over the one favoring MindGames.

Moreover, no evidence was offered to support the majority's inference that "demand had dried up." Further,

the majority begs the question of why demand "dried up," assuming that happened. A jury could reject the "dried up demand" inference altogether or it could find that any "drying up" was the result of the breaches described in ¶¶ 26 and 27 of the Blackwell summary judgment affidavit (App. 90-93): confusion and dissatisfaction among retailers and consumers stemming from poorly printed and wrongly colored box wraps, defective board pieces, missing components (game rules, board pieces, venture cards), incorrectly cut and duplicated clue cards, failure to deliver promised TV ads, an unauthorized price increase, late TV ad campaigns, wrongly targeted radio ad campaigns, underspending on ads and other breaches. The majority also overlooked that Western gave promotion and sale preference to other games, very likely because they required it to pay much lower royalties. App. 93 (¶ 27j). Western itself did not believe demand for *Clever Endeavor* had dried up. Its 1991 annual report to stockholders stated that "*Clever Endeavor* . . . should enjoy significant sales in the coming year."

In holding that MindGames had not proved lost sales due to Western's breaches because it is "equally or more plausible" that "demand had dried up," the Court of Appeals clearly violated the summary judgment standard described in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), where this Court made clear that *Matsushita*'s requirement that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment, stating:

> The Court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in

> reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Id. at 468-69 (footnote omitted).

As long as MindGames' damage evidence, when presented, is reasonable rather than "economically senseless," it is entitled to consideration. Its right to present evidence was cut off here. The Seventh Amendment right to a jury is indeed illusory in the Seventh Circuit if the Court of Appeals can select as between nearly "equal" inferences the one it believes is "more plausible," without having allowed an evidentiary record to be developed, particularly where MindGames had no notice of a need to develop such a record.

The majority's second unwarranted inference is that MindGames' failure to terminate its contract with Western and seek distribution of "Clever Endeavor" by other means ". . . is telling evidence of a lack of commercial promise unrelated to Western's conduct." App. 14. The majority overlooked evidence that Western destroyed MindGames' opportunity to seek other licensees by illegally dumping many thousands of copies of the game at less than 25% of its contractual wholesale price. *See* Blackwell Aff. ¶ 32 (App. 95).

Such oversights illustrate the hazard for the court and the potential for injustice for litigants when a court goes outside the issues developed below and in the appeal briefing to affirm.

Whether in the granting of summary judgment by a district court or the affirming of summary judgment by the court of appeals, judicial fact-finding and denying the nonmovant the benefit of permissible inferences conflicts with settled precedent from this Court. This Court should grant review to preserve the petitioner's right to a jury trial and to remind lower courts that the decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), should not be read as weakening the prohibition against judicial fact-finding.

CONCLUSION

The thrust of this petition is illustrated by the following hypothetical:

P brings an antitrust, securities fraud or other complex tort action. D believes it has a good faith statute of limitations defense and would like to raise it early to avoid the expense of merits discovery. Rule 56 was obviously intended to allow D an immediate adjudication of its dispositive threshold defense.

That purpose is frustrated by the Seventh Circuit's application of Rule 56 because, in opposing summary judgment, neither P nor the district court can rely on a response limited to the time-bar issue. If the district court

dismisses the case as time-barred and P satisfies the court of appeals the case is not time-barred, the Seventh Circuit may nevertheless look to other issues and, if it finds one on which there is insufficient evidence, dismiss the case on that alternative ground.

To forestall such an outcome, P's initial response to the summary judgment motion must include evidence sufficient to make a *prima facie* case on all elements of its claim. Before considering the statute of limitations defense, the district court in turn must allow P sufficient time to take discovery on all elements of its claim. In short, the Seventh Circuit's *de facto* disregard of *Celotex*'s notice requirement has not only vitiated MindGames' constitutional rights to a trial but destroys the efficacy of Rule 56 itself.

This court should take this case (1) to establish the criteria for the notice and hearing required regarding summary judgments on alternative grounds not raised by movants and (2) to rein in the tendency of the appeals court to draw improper inferences on summary judgment appeals in contravention of the right to a civil jury trial.

Respectfully submitted,

E. Campion Kersten
Attorney for the Plaintiffs-
Appellants-Petitioners

KERSTEN & McKINNON, S.C.
231 West Wisconsin Avenue, Suite 1200
Milwaukee, Wisconsin 53203
Telephone: 414/271-0054
Telecopier: 414/271-7131